IN THE

Supreme Court of the United States

October Term, 1962

No. 142

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, JAMES F. KOEHLER, O. H. ENGLISH, EUGENE STULL, M. EDWARD NORTHAM, and CHARLES H. BOEHM, Superintendent of Public Instruction, Commonwealth of Pennsylvania,

Appellants

v.

EDWARD LEWIS SCHEMPP, SIDNEY GERBER SCHEMPP, Individually and as Parents and Natural Guardians of ROGER WADE SCHEMPP and DONNA KAY SCHEMPP,

Appellees

BRIEF FOR APPELLANTS

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

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School District of Abington Township, Pennsylvania, James F. Koehler, O. H. English, Eugene Stull, M. Edward Northam, and Charles H. Boehm, Superintendent of Public Instruction, Commonwealth of Pennsylvania,

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On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion with findings of fact and conclusions of law of the three-judge District Court for the Eastern District of Pennsylvania declaring the former Bible reading statute unconstitutional is reported in 177 F. Supp. 398 (R. 177). The opinion of such court permitting appellees to file their supplemental pleading is reported in 195 F. Supp. 518 (R. 201). The subsequent opinion of such court, with findings of fact and conclusions of law, declaring the amended Bible reading statute unconstitutional, is reported in 201 F. Supp. 815 (R. 228).

JURISDICTION

The final decree of the three-judge District Court for the Eastern District of Pennsylvania was entered on February 1, 1962 (R. 236). Notice of appeal was filed in that court on March 28, 1962 (R. 237). The jurisdictional statement was filed May 24, 1962 and probable jurisdiction was noted October 8, 1962 (R. 241).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

STATUTES INVOLVED

The statute of Pennsylvania previously declared unconstitutional by the three-judge court, as it read at the time appellees' original complaint was filed and the final decree of September 7, 1959 issued, was as follows:

> "Section 1516. Bible To Be Read in Public Schools.—At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge: Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.
>
> If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged."
>
> Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended May 9, 1949, P.L. 939, 24 Purdon's Pa. Stats. Ann. Section 15-1516

The amended statute of Pennsylvania that was declared unconstitutional by the three-judge court in its opinion and decree dated February 1, 1962, is as follows:

"Section 1516. Bible Reading in Public Schools.—At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended December 17, 1959, P.L. 1928, 24 Purdon's Pa. Stats. Ann. Section 15-1516.

The First Amendment of the Constitution of the United States provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment, Section 1, provides as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Is Pennsylvania's Bible reading statute, Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended by the Act of December 17, 1959, P.L. 1928, a law respecting an establishment of religion or prohibiting the free exercise thereof within the prohibition of the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment, by providing for the reading without comment at the opening of each public school on each school day, of at least ten verses from the Holy Bible, subject to the excuse of any child from attending such Bible reading upon the written request of his parent or guardian?

2. Have appellees been deprived of any constitutionally protected right when, in the absence of compulsion on them to believe, disbelieve, participate in or attend a Bible reading exercise in violation of their religious consciences, they have not sought to be excused under a statute which provides the right of excuse, and no measurable tax burden upon them resulting from the Bible reading exercise has been shown?

STATEMENT OF THE CASE

On February 14, 1958, appellees, students in the public schools of Abington Township, Pennsylvania, and their parents, filed their complaint (R. 1) alleging that appellant School District of Abington Township and certain employees thereof were violating the religious consciences and liberties of appellees by causing the Bible to be read in the classrooms of the Abington Township School District pursuant to the then existing Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended May 9, 1949, P.L. 939, which read as follows:

> "Section 1516. Bible To Be Read in Public Schools.—At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge: Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.
>
> If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged."

As the complaint prayed that appellants be enjoined from enforcing this statute, jurisdiction was assumed by

a three-judge court, pursuant to 28 U.S.C. Sections 2281 and 2284, as an action seeking a permanent injunction restraining the enforcement, operation and execution of a State statute.

After trial, the three-judge court, on September 16, 1959, issued its opinion declaring unconstitutional such Bible reading statute and the practice thereunder, on the grounds that it provided for an establishment of religion and interfered with appellees' free exercise of religion (R. 177). The conclusion of the court below was predicated on its factual finding that attendance by all pupils and participation by the teachers were compulsory. In its Eighth Finding of Fact (R. 194), the three-judge court stated:

> "(8) The attendance of all students in both of the aforesaid schools at the ceremony of the Bible reading and recitation of the Lord's Prayer is compulsory."

On the same day, the three-judge court issued its final decree which perpetually enjoined appellants from causing to be read to the students in the public schools of Abington Township the Holy Bible as directed by the Pennsylvania Public School Code, or as part of any ceremony, observance, exercise or school routine (R. 196).

On September 21, 1959, the three-judge court issued its order staying the operation and enforcement of the final decree until final determination of an appeal, and on November 12, 1959, notice of appeal to the Supreme Court of the United States was filed by appellants.

On December 17, 1959 the Legislature of Pennsylvania, to eliminate the compulsory features of the then existing statute amended Section 1516 of the Public School Code to read as follows:

"Section 1516.—Bible Reading in Public Schools.—At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day.

Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

This amended statute differs from the old statute in that the amendment deletes any provision requiring teachers, on pain of discharge, to cause the Bible to be read, and contains the entirely new provision for excusing any child from Bible reading or from attendance at the Bible reading on the written request of his parent or guardian. Following the passage of this amendment, the Abington Township School District altered its practice and now will excuse any child from attendance at Bible reading upon the written request of his parent or guardian (R. 205, par. 10).

On December 23, 1959, appellants filed with the three-judge court their Motion for Relief from Judgment and Final Decree under Rule 60(b) of the Federal Rules of Civil Procedure. Such motion prayed that the final decree be vacated on the grounds, *inter alia*, that the passage of the amendment and the changes it brought about in the Bible reading practice in the Abington Township School District had eliminated any controversy between the parties and had rendered the issues moot.

On June 9, 1960, the three-judge court denied appellants' Motion for Relief from Judgment and Final Decree on the ground that it lacked jurisdiction either to entertain or adjudicate the motion and held that jurisdiction had

passed to and was lodged exclusively with the Supreme Court of the United States.

On August 5, 1960, appellants filed their Jurisdictional Statement and on October 24, 1960, this Court issued its *per curiam* order, which read as follows:

> "The judgment is vacated and the case is remanded to the District Court for such further proceedings as may be appropriate in light of Act No. 700 of the Laws of the General Assembly of the Commonwealth of Pennsylvania, passed at the Session of 1959 and approved by the Governor of the Commonwealth on December 17, 1959." (364 U.S. 298.)

On January 5, 1961, because of the deep concern of the Commonwealth of Pennsylvania in its amended Bible reading statute, the Superintendent of Public Instruction petitioned the three-judge court and subsequently was permitted to intervene in this case as a party defendant (R. 200).

On January 4, 1961, appellees filed their motion for leave to file a supplemental pleading (R. 199), and, after filing of briefs and oral argument, the three-judge court, on June 22, 1961, filed its Opinion and Order granting leave to appellees to file such supplemental pleading (R. 201). Appellants filed their Answer to this supplemental pleading on July 10, 1961 (R. 204), and on October 17, 1961, trial was held before the three-judge court.

At this second trial appellees called Edward Schempp and his son, Roger, and rested their case on the brief testimony given by these two (R. 211-221) and on the evidence that had been previously introduced at the former trial under the old non-excusatory Act (R. 221-225).

On February 1, 1962, the three-judge court issued its opinion declaring the amended statute unconstitutional on the ground that it violates the "establishment of religion" clause of the First Amendment made applicable to the Commonwealth of Pennsylvania by the Fourteenth Amendment (R. 228). The court held that the reading without comment of ten verses of the Holy Bible each morning, at an exercise from which any or all students could be excused, constituted an obligatory religious observance (R. 232).

On the same day, the three-judge court issued its final decree which perpetually enjoined appellants from reading and causing to be read or permitting anyone subject to their control and direction to read to students in the Abington Township Senior High School, any work or book known as the Holy Bible as directed by Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended December 17, 1959, P.L. 1928, in conjunction with, or not in conjunction with, the saying, the reciting, or the reading of the Lord's Prayer (R. 236). Thereafter, on February 5, 1962, the three-judge court issued its Order staying the operation and enforcement of the final decree until final disposition of the case by this Court.

SUMMARY OF ARGUMENT

The activity found by the court below to have violated the First Amendment to the Constitution of the United States was the practice of reading without comment ten verses of the Holy Bible at the opening exercises of the Abington Township High School pursuant to the Public School Code of Pennsylvania. It did not involve coercion of the pupils, any of whom were privileged to be excused upon the written request of their parents. It did not affect the appellees as taxpayers, or in any manner impair their right to exercise freely their religious beliefs.

The holding of the court below that this practice of Bible reading in Pennsylvania's public schools constitutes an unconstitutional "establishment of religion" in violation of the First Amendment is erroneous as a matter of law. The statutory Bible reading practice is not a religious practice. It requires only that those who wish to do so may listen to daily readings without discussion or comment from a great work that possesses many values, including religious, moral, literary and historical. Unlike the program of religious education struck down in *McCollum v. Board of Education*, 333 U.S. 203 (1948), the Pennsylvania practice does not involve proselytizing, persuasion, or religious indoctrination. It involves no avowal of faith, acceptance of doctrine, or statement of belief. Listening to the Bible being read, unlike the religious oath of office in *Torcaso v. Watkins*, 367 U.S. 488 (1961), and the solemn avowal of prayer in *Engel v. Vitale*, 370 U.S. 421 (1962), is not a religious act.

This Court has affirmed that we are a religious people, and that many of our customs compel the conclusion that our public life contains a religious leaven (*Zorach v. Clauson*, 343 U.S. 306 (1952)). Nothing in the Constitution requires that the courts or the government should be hostile to religion. In *Zorach* and *Engel* this Court has stated that the First Amendment requires only that the government be neutral, not friendly or hostile, to religion. The maintenance of such neutrality in the matter of religion in a nation that has this traditional religious leaven in its public life requires that the government neither add to nor subtract from such leaven. The appellants here contend that this Court is not required, under the First Amendment, to eradicate from this nation's public life all voluntary customs and established traditions which some might consider to have religious connotations. It is contended that the Legislature of Pennsylvania cannot be forced by a few persons to abandon a voluntarily attended Bible reading practice which has been traditional in Pennsylvania for generations, on the ground that such reading provides for "an establishment of religion," as held by the court below.

A decision by this Court that the Pennsylvania Bible reading practice is unconstitutional would provide a precedent whereby there could be eliminated from the public life of this nation all those customs and traditions that evidence the religious nature and origin of our country and are now and have long been cherished and accepted by a vast majority of the people. A decision by this Court upholding the constitutionality of the Pennsylvania Bible reading practice would be consistent with its prior holdings. It would reaffirm the constitutional requirement of neutrality to religion, for just as this Court refused to

allow the introduction of religious instruction into the public schools in the *McCollum* case or the creation of an official prayer for public school children in the *Engel* case, so did it permit to continue in public life the voluntary religious oath of office in the *Torcaso* case.

There is a complete absence of proof that the Pennsylvania Bible reading practice affects the appellees as taxpayers or interferes with their right to exercise freely their religion or their religious beliefs. Under the doctrine of *Doremus v. Board of Education*, 342 U.S. 429 (1952), such a failure of proof would have compelled the conclusion that appellees had no standing to maintain this action. Although it is recognized that the decision in *Engel v. Vitale*, 370 U.S. 421 (1962), indicates that this Court may have revised its previous holdings concerning the doctrine of "standing in court," it is contended that by reason of the total failure of appellees to establish any compulsion against them or pecuniary loss, this Court should conclude that appellees have not established standing sufficient to invoke the jurisdiction of this Court.

ARGUMENT

POINT I

APPELLEES HAVE BEEN UNABLE TO SHOW THAT THE BIBLE READING PRACTICE INTERFERES WITH THE FREE EXERCISE OF THEIR RELIGIOUS BELIEFS

A. The Traditional Practice of Bible Reading in Pennsylvania

The practice of reading the Bible at the opening of each school day is a traditional custom that has existed in Pennsylvania since the early times and has been codified since 1913.[1] The practice has always been conducted in a secular manner, devoid of any attempt at proselytizing or the inculcation of religious belief.

The exact origin of Bible reading in Pennsylvania cannot be determined precisely because the custom originated before the practice of maintaining school records developed. That the Bible reading custom existed in the earliest schools may today only be demonstrated inferentially. The various reports of County Superintendents of

[1] The Act of May 20, 1913, P.L. 226. The preamble to this Act stated in part that "it is in the interest of good moral training, of a life of honorable thought and of good citizenship, that the public school children should have lessons of morality brought to their attention during their school days."

Schools contained in *Report of the Superintendent of Common Schools of the Commonwealth of Pennsylvania for the year ending June 4, 1866* (Harrisburg 1867), indicate that the custom had been a long established one as early as 1866. That the Bible reading custom was shared by other states is evidenced by the *Annual Report to the Massachusetts Board of Education* submitted by Horace Mann in 1847, in which he stated:

> "The use of the Bible in the schools is not expressly enjoined by law, but both its letter and its spirit are consonant with that use, and, as a matter of fact, *I suppose there is not, at the present time, a single town in the commonwealth in whose schools it is not read.*" (Emphasis supplied)[2]

Further light on the history of this practice in Pennsylvania is furnished by the opinion of Judge Edwards of the Court of Common Pleas of Lackawanna County in *Stevenson v. Hangon*, 7 Pa. Dist. Rep. 585 (1898), at page 588:

> ". . . It is worthy of comment and reflects creditably upon the good sense of the people of Pennsylvania, that, although our common school system has been in existence for many years, and that, as a general rule, in a large number of school districts throughout the State, portions of the holy scriptures have been read as a part of the daily opening exercises, nobody up to this time has taken such interest in the question as to secure a decision upon it from our court of last resort. . . ."

Although the Supreme Court of Pennsylvania has never had before it a case involving the practice of reading

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[2] FULLER, HORACE MANN ANNUAL REPORTS, 595 (1868).

selections from the Bible in the public schools, such practice was held constitutional in several decisions of the Courts of Common Pleas:

Hart v. School District, 2 Chester County Reports 521 (1895);

Curran v. White, 22 Pa. County Reports 201 (1898);

Stevenson v. Hangon, supra.

While the question of Bible reading was being settled by the courts of Pennsylvania, the then Superintendent of Public Instruction, Dr. Nathan C. Schaeffer, edited a book of Bible readings for schools and stated in the Preface as follows:

> "• • • Bible readings cannot be omitted from the exercises of the school without the gravest loss and the most serious consequences.
>
> It is, of course, not the mission of the public school to teach the creed or the doctrines of any religious denomination. That is the province of the home, the church, and the Sabbath School. In making this collection of Bible readings, the aim has been to bring together selections that appeal strongly to the moral nature of the child. In modern education it has become proverbial to say that the perpetuity and prosperity of the state depend upon the intelligence and virtue of the people. . . ."[3]

The first statutory enactment covering Bible reading in Pennsylvania was the Act of May 20, 1913, P.L. 226. The intent of the Act was stated in its preamble which read as follows:

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[3] AMERICAN BOOK COMPANY, BIBLE READINGS FOR SCHOOLS (1897).

"Whereas, The rules and regulations governing the reading of the Holy Bible in the public schools of this Commonwealth are not uniform; and

"Whereas, It is in the interest of good moral training, of a life of honorable thought and of good citizenship, that the public school children should have lessons of morality brought to their attention during their school-days . . . ."

The practice of Bible reading developed as an aid to moral training, and not for the purpose of introducing religion or sectarian instruction into public education. The people of Pennsylvania, speaking through their Constitution and Legislature, have long followed the policy of avoiding religion or sectarianism in their public schools.[4]

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[4] Article I, Section 3 of the Pennsylvania Constitution of 1874 provides:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship."

Article X, Section 2 of the same Constitution, provides:

"No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

Section 108 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, 24 Purdon's Penna. Stat. Ann., Section 1-108, provides:

"No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee, or employe in the public schools of this Commonwealth."

This same provision was included as Section 2801 of the Pennsylvania School Code of May 18, 1911, P.L. 309.

B. The Bible Reading Practice in Abington Township School District

Since the passage of the 1913 Act the Bible reading practice has been continuously prescribed by statute in the Commonwealth of Pennsylvania. The present Superintendent of Public Instruction of Pennsylvania, Dr. Charles H. Boehm, considers that the practice has both educational and moral value for the students (R. 89-90).

At the Abington Senior High School the practice is conducted as follows: Between 8:15 and 8:30 of each school morning, while the students are in their Home Rooms or Advisory Sections, there is heard over the public address system a morning program which includes the reading of ten verses of the Bible without comment, the saying of the Lord's Prayer, the flag salute, and the school announcements for that particular day (R. 102-103, 108-109). The persons who conduct this opening exercise over the public address system are students of the radio and television course, which is part of the teaching program of the school (R. 109). Participation in this course is voluntary with

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Section 1112(a) of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, 24 Purdon's Penna. Stat. Ann. Section 11-1112(a), further provides:

> "That no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem, or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."

This provision, in substantially the same language had appeared as Section 1 in the Act of June 27, 1895, P.L. 395. This Section 1 was preceded by the following preamble:

> "Whereas, It is important that all appearances of sectarianism should be avoided in the administration of the public schools of this Commonwealth."

the student (R. 131). The student who reads the verses from the Bible may use any version of the Bible. The King James version, the Catholic Douay version, the Jewish Holy Scriptures and the Revised Standard version have been so used (R. 109-112). The particular verses to be read are selected by the student who does the reading (R. 103-104, 113).

With regard to the actual reading of the Bible, there are no prefatory statements made, no questions are solicited, no comments or explanations are made before, during or after its reading. No instruction is contemplated; no interpretation is given. As the statute specifically provides that the reading be "without comment" the ten verses are simply read to those students who have elected to participate. They may listen, they may accept, reject, believe or disbelieve any part or all of what they hear. No participatory act is required and what significance the student draws from this practice is completely a matter of his own choice, as there is and can be no promotion, dissuasion or persuasion, and in addition, the student knows that neither he nor any of his classmates need be present during the Bible reading.

Although the practice of Bible reading has been followed for many years in the Commonwealth, there is no evidence that, with the exception of the present appellees, there ever has been a complaint concerning such practice lodged by any student or parent, and the Superintendent of Public Instruction of Pennsylvania, the Superintendent of Schools of Abington Township, and the Principal of the Abington Senior High School have testified that in all their long experience they have received no such complaint (R. 89, 125, 104). Nor has any evidence been introduced that would indicate that the superintendent, administra-

tors, teachers, students, parents, or anyone else, coerced, or attempted to coerce, any child to attend or not attend the Bible reading period or that any stigma is attached to a student who is excused from attending.

C. The Evidence Offered by Appellees

The appellees contend that the continuance of this traditional Bible reading custom violates their constitutional rights and in support of their contention offered the following evidence at the second trial when testimony was taken concerning the operation of the presently existing Bible reading statute which provides for the excuse of those students who do not wish to attend.

Edward Lewis Schempp, the father, testified that under the prior Act, which made no provision for excuse, he had objected to his children being exposed to the reading of the King James Bible because it was against his family's religious beliefs. He stated that "theoretically" he would have liked to have had his children excused from the earlier Bible reading practice (R. 214). He testified that he was familiar with the excuse provision of the new Act (R. 211), but that he had not elected to have his children excused because by so doing he believed that his children would be considered "odd balls", atheists, un-American, "immoral and other things" (R. 214). He stated that under the "mechanics", as he described them, of the Bible reading practice at Abington High School (R. 215-218) it would be difficult for the school to arrange to excuse a child (R. 216, 218) and that being made to stand outside the classroom in the hall was a form of punishment at the

school (R. 218). On cross-examination, Mr. Schempp admitted that his only knowledge of the Bible reading practice conducted at Abington High School was what his children had told him (R. 219), that he had never heard of a child at the Abington High School being made to stand outside a classroom for not attending Bible reading (R. 219), and that he had never discussed the problem of Bible reading or being excused therefrom with the Superintendent or any administrative officer in the Abington Township School District (R. 219).

Roger Schempp, the son, testified that he was a student at Abington High School, that he had been present at the morning "routine" at that school and that his father had correctly described such routine in his testimony (R. 221).

The foregoing represents all of the evidence produced by appellees in support of their contention that the amended Bible reading act of the Commonwealth of Pennsylvania which is before this Court violates their constitutional rights and should be struck down.

Counsel for appellees argues that appellees' case also rests upon the testimony offered at the first trial under the old Bible reading statute (R. 221). Such testimony, we submit, has no probative value now since it concerned only the former practice which required that all students attend, and that teachers must conduct the Bible reading on pain of dismissal.

Ellory Schempp's testimony at the first trial that he was compelled to attend Bible reading is now totally irrelevant not only because he has been graduated from the Abington High School but also because, under the new Act, he admittedly could have been excused.

All of the testimony of Donna and Roger Scheinpp concerning the Bible reading practice at the Huntingdon Junior High School is now equally irrelevant since neither is now a student at the Huntingdon Junior High School. Nor can the testimony of appellees' expert, Dr. Grayzel, as to the effect on a Jewish student of listening to New Testament reading, be of any probative value now since, under the present law, no student need be present when the Bible, Old Testament or New, is being read. In short, every word of appellees' testimony, offered at the first trial, was concerned with a practice in which all the children, including these minor appellees, were compelled to attend. Such practice no longer exists.

The weakness of appellees' case is most clearly understood when it is realized that none of them testified that the present excusatory Bible reading practice, which is the subject of this suit, deprives them of their religious freedoms or interferes with the free exercise of their religious beliefs. Donna (R. 81-82), Roger (R. 77-79) and Ellory (R. 13-14) testified in the first trial that under the old compulsory Act the Bible reading practice confused and aggrieved them; yet not one of them has come forward to say that the practice under the new Act also confuses and aggrieves them. Since Ellory has been graduated the case as to him is moot, but Donna did not testify at the hearing held following the passage of the new Act, and Roger, who did testify, said only that his father had correctly described the new practice. Roger did not complain of the new practice as he had complained at the first trial of the old non-excusatory practice.

D. There Is No Interference With Appellees' Free Exercise of Religion

A most thorough and sympathetic scrutiny of appellees' evidence indicates that it shows not that their right to exercise freely their religious consciences or beliefs are affected, but only that Mr. Schempp himself believes that his son would be considered an "odd ball" if he were to be excused from the Bible reading practice, a belief which, surprisingly enough, his son Roger did not support by his own testimony. This is rather slender support for a charge of unconstitutionality. Such evidence does not show that Roger was considered by his classmates to be an "odd ball" nor that his father believed his classmates considered him an "odd ball". All it showed was the father's belief that if Roger were excused from the practice Roger's classmates would consider him an "odd ball". The applicability of the Constitution to the contentions here asserted was well stated by the late Mr. Justice Jackson in his concurring opinion in *McCollum v. Board of Education*, 333 U.S. 203 (1948), at pp. 232-33:

> "But here, complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. *Since no legal compulsion is applied to complainant's son*,

himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground."

In the final opinion of the court below, Judge Biggs stated (R. 233):

> "We hold the statute as-amended unconstitutional on the ground that it violates the 'Establishment of Religion' clause of the First Amendment made applicable to the Commonwealth of Pennsylvania by the Fourteenth Amendment. We find it unnecessary to pass upon any other contention made by the plaintiffs in respect to the unconstitutionality of the statute or of the practices thereunder."

Although this would appear to rule out of the case the question of "free exercise", prudent advocacy demands exposition of this point.

The Bible reading practice in question does not entail worship by those attending; it does not require any profession of faith or expression of belief.[5] To the extent that attendance alone may be regarded as a violation of conscience (as in *Barnette*), the excuse provision in the 1959 Act precludes this from being a violation of conscience.

Appellees argue that the excuse provision is not enough. They contend that the need for requesting excuse is a governmental forcing of a profession of belief or dis-

[5] In this sense, the Bible reading practice is clearly less "religious" than the flag salute exercise in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where Mr. Justice Jackson, in the opinion of the Court, found: "Here, however, we are dealing with a compulsion of students to declare a belief." (319 U.S. 624, at 631.)

belief, and results in social disapproval of those excused. This contention is totally unsupported by logic or by the facts. No profession of belief or belief itself is required of those attending, and choosing to exercise the excuse provision merely reflects some unidentifiable ground for non-attendance.

While there is no evidence of social disapproval in the record, if it is assumed that social disapproval would result, this does not render the prescribed practice unconstitutional. The "free exercise" clause should and does protect and encourage individual freedom of conscience, but it does not and should not compel the cessation of practices, otherwise legitimate, merely to protect individual "dissenters" thereto from possible unpopularity or embarrassment. This much is clear from *Barnette*[6] and from Justice Jackson's concurring opinion in *McCollum*, *supra*.

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[6] This clear meaning of the "free exercise" clause was also delineated by Mr. Justice Frankfurter in his dissent in *Barnette*, 319 U.S. at 662:

> "That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority."

POINT II

THE COURT BELOW ERRED WHEN IT HELD THIS CASE WAS GOVERNED BY McCOLLUM V. BOARD OF EDUCATION FOR THE BIBLE READING PRACTICE IS FUNDAMENTALLY DIFFERENT FROM THE PROGRAM OF RELIGIOUS INSTRUCTION IN McCOLLUM AND FROM ALL OTHER RELIGIOUS PRACTICES HERETOFORE CONSIDERED BY THIS COURT. APPELLEES' ATTACK UPON THE BIBLE READING PRACTICE RAISES A CONSTITUTIONAL ISSUE NEVER BEFORE DETERMINED BY THIS COURT

The First Amendment to the Constitution reads in part as follows:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."

In light of the decision of the court below, this Court must determine whether the Pennsylvania Bible reading practice prescribed by Section 1516 of the Public School Code of 1949, as amended December 17, 1959, constitutes an "establishment of religion" within the meaning of the First Amendment.

A. The Pennsylvania Bible Reading Practice Does Not Involve Proselytizing, Religious Indoctrination or Instruction

In the final opinion of the court below (201 F. Supp. 815) Judge Biggs stated (R. 233):

> "The case at bar is governed by *McCollum v. Board of Education*, 333 U.S. 203 (1948). Its essential facts and those of *McCollum* are quite similar. They need not be compared here. . . ."

We respectfully submit that the court below erred in holding that this case is governed by *McCollum*.

In *McCollum*, this Court held unconstitutional a program of "released time" religious education operated in the classrooms of the public schools of Champaign, Illinois. The declared and the only purpose of the Champaign program was to provide formal religious instruction for students grouped according to their sectarian preferences. In the words of Mr. Justice Frankfurter, at 333 U.S. 226, the "candid purpose" of the Champaign program was "sectarian teaching". This is not true of the Bible reading practice at the Abington High School. The record here is devoid of evidence to show that the "essential facts" in the instant case are "quite similar" to those in *McCollum* as stated by Judge Biggs. Unlike *McCollum* there is not at Abington nor can there be any instruction, teaching, proselytizing or indoctrination in connection with Bible reading because the statute itself provides that no comment can be made. The voluntary listening to ten verses of the Bible, selected and read without comment by one of the students of the radio and television course is not even remotely similar to the program for religious instruction struck down in the *McCollum* case. That the element of proselytizing and religious instruction must be present to warrant the application of the *McCollum* doctrine was recently expressed by Mr. Justice Douglas in his concurring opinion in *Engel v. Vitale*, 370 U.S. 421 (1962), at p. 439:

> "McCollum v. Board of Education, 333 U.S. 203, does not decide this case. It involved the use of pub-

lic school facilities for religious education of students. ... In the present case, school facilities are used to say the prayer and the teaching staff is employed to lead the pupils in it. There is, however, no effort at indoctrination and no attempt at exposition. Prayers, of course, may be so long and of such a character as to amount to an attempt at the religious instruction that was denied the public schools by the McCollum case. But New York's prayer is of a character that does not involve any element of proselytizing as in the McCollum case."

B. The Pennsylvania Bible Reading Practice Does Not Require or Contemplate the Performance of a Religious Act

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In *Torcaso v. Watkins*, 367 U.S. 488 (1961), this Court held unconstitutional a Maryland statute that required an individual to profess a belief in a Supreme Being as a condition to holding public office. In *Engel v. Vitale*, 370 U.S. 421 (1962), this Court held unconstitutional both the action of the State Board of Regents of New York in composing an official prayer and suggesting its daily recitation in the public schools and the school district's resolution ordering such recitation. Saying such prayer, this Court held, would be "a solemn avowal of divine faith and supplication for the blessings of the Almighty."

In both of these cases the statute or regulation held unconstitutional either required or suggested the performance of an affirmative act which would evidence the religious belief of the actor. This is not true of the Bible reading practice for the suggested passive act of listening can in no way evidence the religious beliefs or disbeliefs

of the listener. It contemplates merely the exposure to a book which is undoubtedly one of the greatest written sources of the ethical structure of our society. No affirmative act of accepting, professing or believing in what is being listened to is either required by the Bible reading practice or necessary to give meaning and purpose to the practice. This follows because readings from the Bible, wholly apart from whatever religious significance they may have, also may contain literary beauty, historical significance and moral values. Thus, any student, regardless of his religious beliefs or disbeliefs can gain much of secular value from listening to the Bible being read. This is not so with the Maryland oath of office or the Regents' prayer, for an oath professing belief in a Supreme Being or a prayer asking His mercy is and can be nothing other than a purely religious act.

Appellees claim that the student's act of choosing whether he will be present during the Bible reading is an act that professes his belief or disbelief. This cannot be true, for if the student elects to listen no one can tell whether he believes or disbelieves what he hears, whether he listens just because his classmates do, whether he finds beauty in the language, or whether he remains in his seat for any of a countless number of other reasons. If he elects to absent himself, it could mean that he disbelieves so strongly that he cannot bear to even listen, that he believes so strongly that he will listen only when it is read liturgically, that he holds a shade of belief or disbelief between these two extremes, or that he has a reason for absenting himself wholly unrelated to matters of religion, conscience or belief.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1942), this Court struck down a regu-

lation of the State Board of Education which required all teachers and students to make a daily pledge of allegiance to the flag for it was shown that performing such pledge was considered an anti-religious act by Jehovah's Witnesses. The pledge of allegiance, unlike the Maryland oath or the Regents' prayer, is not a purely religious act, in fact only a few consider it so. However, as to those few, this Court held that they need not comply since otherwise they would be forced to perform what they considered to be an affirmative anti-religious act. In the Bible reading practice no affirmative act, religious or otherwise, is required of anyone whether he chooses to listen to the Bible or not.

It is therefore respectfully submitted that it is totally unrealistic to argue that listening to the reading of ten verses of the Bible daily at the opening of Pennsylvania's public schools is an "establishment of religion" within the meaning of the First Amendment in the absence of any compulsion to perform an act of faith, to assert a belief or disbelief of any kind, or to participate in any program designed to indoctrinate or proselytize.

C. Appellees' Objection to the Pennsylvania Bible Reading Practice Is Based on the Novel Contention That a Practice Which Evidences the Religious Origins and Traditions of the Nation Constitutes an "Establishment of Religion" in Violation of the First Amendment

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Since the Bible reading program is completely voluntary for all students, since it is not designed to provide religious indoctrination for even those students who wish to participate, and since it does not require or even sug-

gest the performance of a religious act, the only basis for appellees' contention that the practice be forbidden to all must be their belief that since the Bible itself, as a document, does possess religious significance, that any use of it authorized by the state must, of necessity, violate the First Amendment to the Constitution. Because the vast majority of the people of Pennsylvania may believe that the Bible possesses religious significance, that it is in many ways a symbol of the religious origins and traditions not only of Pennsylvania but this nation, it does not follow that daily reading of the Bible at the opening of public schools constitutes a religious ceremony or is an unconstitutional "establishment of religion". By their long-standing acceptance and support of this program, culminating in the amendment to the statute here under consideration, the people of Pennsylvania have long demonstrated that the reading of the Bible is a good custom in their schools for they believe that much of secular value can be gained by the listener regardless of what, if any, religious significance he attributes to the text being read.

Consequently, the fundamental issue in this case is what does the First Amendment to the Constitution require us to do with one of the old established customs of our country[7]—a custom that, although voluntary and with

[7] Annexed to this brief as an Appendix is a compilation of statutory, decisional and administrative references showing that twenty-four other states and the District of Columbia require or expressly permit the reading of the Bible in public schools. In 1961 there were 23,146,376 pupils enrolled in full-time public elementary and secondary day schools in these Bible reading jurisdictions according to the United States Department of Health, Education and Welfare, Office of Education, 'Publication OE-20007-61, Circular No. 676 (1962) entitled "Fall 1961 Enrollment-Teachers and School Housing", page 10.

secular values, also in some way reflects the religious origin and tradition of this nation. It is respectfully submitted that this question is novel with this Court and that the cases heretofore decided did not concern this precise issue with which the Court is now confronted.

POINT III

THE NEUTRALITY TO RELIGION REQUIRED BY THE FIRST AMENDMENT MEANS THAT THE GOVERNMENT CANNOT BE FORCED BY THE RELIGIOUS OR BY THE NONRELIGIOUS TO ADD TO OR SUBTRACT FROM THE TRADITIONAL AND VOLUNTARY RELIGIOUS LEAVEN THAT HAS ALWAYS EXISTED IN OUR PUBLIC LIFE

A. This Nation Is and Always Has Been a Religious People as Is Evidenced by Many of the Customs and Traditions in Our Public Life

An analysis of the cases dealing with the application of the First Amendment reveals a consistently reiterated judicial concept concerning the status of religion in this nation in relation to the religious freedoms protected by the Constitution. The inevitable conclusion from the decided cases is that we are today and always have been a religious people. We believe this conclusion would be accepted by even a casual student of this nation's history or routine observer of this nation's present public life. We need not here set forth the religious convictions of the Founding Fathers, the invocations of the Almighty in our cherished national documents, the prayers in our legislative halls, the military chaplains, the use of religious inscriptions on our coinage, the tax exemptions for church property and the myriad other manifestations of the re-

ligious leaven in our public life.[8] They are well known to this Court and their significance has often been affirmed by it:

> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people."
>
> *Holy Trinity Church v. United States*, 143 U.S. 457, 470 (1892).

* * * * * * * *

> "We are a religious people whose institutions presuppose a Supreme Being."
>
> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

A further conclusion to be found in the cases is that the First Amendment does not require that the government be hostile or unfriendly to religion. Rather, it presupposes and requires an attitude of neutrality on the part of the government.

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State . . . That is the common sense of the matter. Otherwise the state and religion would be aliens to each other, hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be

[8] For an excellent summation of such manifestations, reference may be made to Appendices to Brief of Respondents filed in *Engel v. Vitale*, at No. 468 October Term, 1961, in the Supreme Court of the United States.

permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court'".

Zorach v. Clauson, 343 U.S. at 312-13.

* * * * * * * *

". . . The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the nonbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."

Engel v. Vitale, 370 U.S. 421, 443 (concurring opinion, 1962).

That the Constitution permits the government to cooperate with religious authorities was indicated by Mr. Justice Douglas in the *Zorach* case, *supra*, when he said at page 314:

". . . To hold that it may not would be to find in the Constitution a requirement that the government

show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . ."

To strike down as a violation of the First Amendment Pennsylvania's amended Bible reading statute would constitute a departure from the traditional relationship between government and religion and would in fact be hostile to those who wish to preserve in our public schools a practice reflecting and consistent with the legal concept that this nation is indeed a religious people.

B. Neutrality Means That the Government Shall Neither Add to Nor Subtract From the Religious Leaven of This Nation

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Our nation admittedly has a leaven of religious content in its public life. The Constitution requires our government to be neutral toward religion. The legal problem is how should this Court combine these two concepts in determining the constitutionality of Pennsylvania's traditional Bible reading practice? We here suggest that the solution is that government should neither help nor harm either the religious or the nonreligious; that it should not allow the religious to add to the religious leaven nor permit the nonreligious to subtract from it? In Mr. Justice Douglas' concurring opinion in *Engel v. Vitale*, 370 U.S. 421, 443, he said:

> "But 'if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government'. McGowan v. Maryland."

If the government must be neutral rather than hostile to religion, would not the above quotation be equally valid if it read:

> ". . . if a religious leaven is to be worked *out* of the affairs of our people, it is to be done by individuals and groups, not by the Government."

The Bible reading practice in our public schools, like the prayers in our legislative halls, the chaplains in our military forces, "So help me God" in our courtroom oaths and the numerous similar traditions and customs that exist in our public affairs, is all a part of a way of life that has been accepted and cherished by generations of Americans. They make up the religious leaven of our culture and evidence the religious origin and nature of our people. Would it be neutral for the government now to rip out all such customs from our public life? Certainly this Court, in its most recent decision concerning the First Amendment, did not indicate that such customs, even though translated into statutes by the states, must be removed. In *Engel v. Vitale*, 370 U.S. 421, at footnote 21, page 435, the Court said:

> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the

unquestioned religious exercise that the State of New York has sponsored in this instance."

Is it neutral for the government to aid the nonreligious in their attempt to establish nonreligion as the ruling concept? Does not the religious neutrality required by the First Amendment mean that neither the religious nor the nonreligious may use the government to improve their respective positions? The only alternative to such neutrality would be a policy that required the government to remove from public life all of the admittedly existing religious leaven and in its place establish an absolute nonreligious state. Such a policy could not be considered by reasonable men to be anything other than one of hostility toward religion as a matter of law.

[9] Dean Emeritus Luther A. Weigle of the Yale Divinity School in his introduction to the book GOD IN OUR PUBLIC SCHOOLS, by W. S. Fleming, at page 26, said the following in this connection:

> "A system of education which gives no place to religion is not in reality neutral but, exerts an influence, intentional though it be, against religion . . . The omission of religion from the public schools conveys a condemnatory suggestion to the children."

William Clayton Bower, a former professor in the University of Chicago, in his book, THE CHURCH AND STATE IN EDUCATION (University of Chicago Press), page 33, has this to say:

> "In the church and in the religious home the growing person is led to believe that religion is the most important concern of life while in the school religion is relegated to a position of unimportance by being treated with silence and neglect. The result is more serious than appears on the surface. Without intending it, the school is placed in the position of exerting a negative influence regarding religious since what appears to be neutrality turns out practically to be a discrediting of religion."

C. The Policy of Neutrality Is Consistent With the Prior Decisions of This Court

We submit that the neutrality to religion required by the First Amendment impels the conclusion that the court below erred in holding Pennsylvania's Bible reading practice unconstitutional as an "establishment of religion". To reverse the court below would be consistent with the prior decisions of this Court wherein the Court disallowed attempts to *add* to the religious leaven of the nation when it struck down a plan to introduce admittedly religious instruction in the public schools (*McCollum v. Board of Education*, 333 U.S. 203 (1948)) and when it prevented public officials from writing a *new* prayer to be said in the public schools (*Engel v. Vitale*, 370 U.S. 421 (1962)). Neither religious instruction in the public schools nor the composing of school prayers by public officials was part of the religious tradition of this country. That there is a valid distinction between the newly composed and the traditional was noted by Professor Arthur E. Sutherland, Jr. in his recent article, *Establishment According to Engel*, 76 Harv. L. Rev. 25 (1962), where he says, at p. 38:

> ". . . And a constitutional flaw of the Regents' Prayer may be its comparative novelty. *America* is an old song. There is common sense in the distinction between the long-established and the novel. A man can reasonably say that what has become traditional is less constitutionally objectionable than an innovation.[38] At the margins of the minimally tolerable, such fine differences are not ridiculous."

> "[38] The degree of obscenity which is legally tolerated seems to bear a relation to the age of the lit-

erature. In modern dress the Miller's Tale and the Reeve's Tale would raise interesting questions under Roth v. United States, 354 U.S. 476 (1957). And in measuring procedural due process, what men are used to is relevant. See, e.g., the opinion in Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856)."

In the same pattern of neutrality this Court did not subtract from the religious leaven of the country when it held a religious oath of office need not be observed by a nonbeliever for it did not hold that the oath could not be made by a believer (*Torcaso v. Watkins*, 367 U.S. 488 (1961)). In the *Barnette* case (319 U.S. 624 (1942)) this Court likewise did not hold that the custom of pledging allegiance must be denied to all school children. Again in the Sunday Blue Laws case, this Court held that although the traditional observance of Sunday as a day of rest may be amply justified under the police powers of the state, such customary observance need not be struck down merely because it happened to be part of the religious leaven of our country (*McGowan v. Maryland*, 366 U.S. 420 (1961)).

D. A Decision by This Court To Strike Down the Bible Reading Practice Would Provide the Means Whereby Every Vestige of the Religious Traditions of This Nation Could Be Removed From Public Life

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If this Court were to strike down Pennsylvania's Bible reading practice it would open a Pandora's box of litigation which could serve to remove from American public life every vestige of our religious heritage. Since the

Bible reading practice is voluntary and has secular values, its prohibition by this Court would logically impel the conclusion that the other traditions must fall. Certainly "God save this Honorable Court", "So help me God" and "In God We Trust" would fall, for such expressions have no secular meaning, there is nothing voluntary about a court of law and no one has a choice as to which currency he will use. The chaplains of our legislative bodies and our military forces could not be allowed to continue to conduct, at the nonreligious taxpayers' expense, their religious functions. Tax exemptions for church property would also fall, as well as statutory draft exemptions for conscientious objectors. With regard to the public schools, perhaps established school holidays could continue if they were renamed, but even this might be construed as only colorable compliance with the requirements of the Constitution. It would seem that any official use of the Christian calendar with its B.C. and A.D. must be discontinued and the seven day week, being of Biblical origin, should become either a six or an eight day period. The traditional day of rest, rather than falling on the Christian Sunday, or the Jewish Sabbath, should fall on a nonreligious Wednesday or Thursday, although the latter, being a corruption of Thor's day, may be objectionable because of its Germanic religious connotations.

The task facing this Court, if it undertook to remove from the public schools all practices that some might claim contain religious connotations, is well set forth in the following statements by Mr. Justice Jackson and Mr. Justice Frankfurter:

> "To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local

controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. * * * If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

* * * * * * * * * *

"I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. . . .

* * * * * * * * * *

"We must leave some flexibility to meet local conditions, some chance to progress by trial and error. * * * The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. * * * If with no surer legal guidance we are to take up and decide every variation of this controversy, raised by persons not subject to penalty or tax but who are dissatisfied with the way schools are dealing with the problem, we are likely to have much business of the sort." (Jackson, J., concurring in *McCollum*, 333 U.S. at 235, 237-38.)

". . . The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great

English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems, because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See Washington ex rel. Clithero v. Showalter, 284 U.S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare Scopes v. State, 154 Tenn. 105, 289 S.W. 363. What of conscientious objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war.

* * * * * * * * *

"That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they

may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority." (Frankfurter, J., dissenting in *Barnette*, 319 U.S. at 659, 660 and 662.)

While we do not suggest that these other traditions would immediately fall upon the invalidation of our Bible reading statute, it is not far-fetched to believe that many of these customs could eventually meet the same fate.

POINT IV

APPELLEES DO NOT HAVE STANDING TO INVOKE THE JURISDICTION OF THIS COURT

Appellees have contended that even if the provision for excuse from attending Bible reading disposes of their argument that the Bible reading statute prohibited the free exercise of religion, it does not affect their argument that the statute is an establishment of religion. Such contention ignores the fundamental principle that if the appellees are not deprived of any constitutionally protected freedom, they have no standing to invoke the Constitution, and the Court has no jurisdiction to pass upon the constitutionality of the Act in question.

The First Amendment becomes binding upon the states only by virtue of the due process clause of the Fourteenth Amendment. In order to have the Court pass on their contention that an Act of the General Assembly of the Commonwealth of Pennsylvania constitutes an unconstitutional establishment of religion, the appellees must show that they are persons who, as a result of the enforcement of the Act, are deprived of life, liberty or property without due process of law.

Even more fundamental than the requirement that the plaintiff show a deprivation of liberty or property under the Fourteenth Amendment is the limitation on the power of this or any Federal court to declare a legislative act unconstitutional. Under Article III, Section 1 of the Constitution, the only power exercised by the Supreme

Court and any Federal court is *judicial* power. Under Article III, Section 2, this power extends only to "cases or controversies" within its meaning. It has therefore become well settled that the Court has no jurisdiction to render an advisory opinion as to the constitutionality of any legislative act of either Congress or a State Legislature. This fundamental limitation on the judicial power under the Constitution remains today, as stated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 405 (1821):

> ". . . The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to 'a case in law or equity,' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend."

A "case or controversy" within the judicial power of the United States courts exists only when there is a litigation affecting the rights of the parties as to their persons or property. It is essential to the existence of jurisdiction that the plaintiff show a legally protected interest, personal to him, which is invaded or threatened by the actions of the defendant. In *Frothingham v. Mellon*, 262 U.S. 447, 488 (1922), the Court, speaking through Mr. Justice Sutherland, said:

> ". . . We have no power *per se* to review and annul acts of Congress on the ground that they are

unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

This Court, in *Poe v. Ullman*, 367 U.S. 497 (1961), declined to pass on the constitutionality of the Connecticut statute prohibiting the use of contraceptive devices and the giving of medical advice on the use of such devices, on the ground that there was not a sufficient showing on the record that the plaintiffs were threatened with imminent prosecution.

The Opinion of the Court by Mr. Justice Frankfurter heavily underscores the limitations upon the power of the Supreme Court and Federal Courts to adjudicate constitutional issues. The necessity of a "case or controversy" is only one of the limitations on that power, which is further circumscribed by the principle that the Court will not entertain constitutional questions except in cases

where the constitutional determination is strictly necessary in order for it to decide a real case. The Court said (367 U.S. 503-505):

> "'The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.' Parker v. County of Los Angeles, 338 U.S. 327, 333.[4] See also Liverpool, N. Y. & P.S.S. Co. v. Commissioners, 113 U.S. 33, 39. The various doctrines of 'standing,'[5] 'ripeness,'[6] and 'mootness,'[7] which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations—each having its own 'varied application'[8]—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action . . . Sterns v. Wood, 236 U.S. 75; Texas v. Interstate Commerce Comm'n, 258 U.S. 158; United Public Workers v. Mitchell, 330 U.S. 75, 89-90. 'This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here.' Georgia v. Stanton, 6 Wall. 50, 75, approvingly quoting Mr. Justice Thompson, dissenting, in Cherokee Nation v. Georgia, 5 Pet. 1, 75; also quoted in New Jersey v. Sargent, 269 U.S. 328, 331. 'The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct in-

jury as the result of its enforcement. . .' Massachusetts v. Mellon, 262 U.S. 447, 488.[9] ''

Thus, in *Doremus v. Board of Education*, 342 U.S. 429 (1952), in which the plaintiffs contended that a New Jersey statute providing for reading the Bible in public schools was unconstitutional, the Supreme Court dismissed the appeal as moot because the child of the plaintiff-parent had graduated from school and the rights of such child were therefore moot. Despite plaintiffs' contention that they were still entitled to maintain the appeal as citizens and taxpayers, the Supreme Court held that the suit could not be maintained as a taxpayer's action because the plaintiffs had not shown that as taxpayers they had any financial interest in the case, or were in any immediate danger of sustaining direct injury in measurable amount, or that the practice of reading the Bible in the school added any sum to the cost of conducting the school. The appeal was dismissed for lack of a justiciable controversy.

The present action cannot be maintained as a taxpayer's suit, nor has it ever been seriously argued that it could be. The appellees do not even allege that they pay any taxes to the Abington Township School District. They have not alleged that the practice of Bible reading adds any measurable amount to the cost of conducting the schools. In any event, it is clear under the decision of the Supreme Court in the *Doremus* case that such a minimal expenditure as might be involved in the purchase of Bibles is not a measurable appropriation of public funds of which a taxpayer is entitled to complain.

The appellees attempt to bring themselves within the decision of the Supreme Court in *McCollum v. Board of Education*, 333 U.S. 203 (1948), wherein the plaintiff was

permitted to maintain an action in the dual capacity as taxpayer and parent of a child in school. However, that case involved the use of classrooms for programs of admittedly protracted religious instruction by priests, rabbis, and ministers. Subsequent decisions of the Court in the *Doremus* case and in *Zorach v. Clauson*, 343 U.S. 306 (1952), demonstrate that the Court will not invalidate a practice alleged to be an unconstitutional establishment of religion unless the plaintiffs show that they have sustained injury either as taxpayers or as parents of pupils compelled to participate in a religious ceremony in violation of their constitutional freedom of worship. In *Zorach* the Court sustained the constitutionality of the New York released time program on the ground that participation in the program of religious instruction was entirely voluntary, and because there was no use of the tax-supported school property for religious purposes. The Court distinguished *McCollum* on the ground that all of the costs of the New York program were paid by the religious organizations and not by the public school district.

The position of the Supreme Court in *Doremus* was foreshadowed in the concurring opinion of Mr. Justice Jackson in the *McCollum* case itself. He there pointed out that a Federal court may not interfere with local school authorities unless they are invading either a property right or a personal liberty protected by the Federal Constitution. Such a challenge to a local statute or practice should come before the Court in either of two ways: (1) when a person is required to submit to some religious rite or instruction as in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); or (2) when a taxpayer charges that there is a measurable burden on taxpayers for funds expended for unconstitutional pur-

poses, as in *Everson v. Board of Education*, 330 U.S. 1 (1947).

Applying these principles to the facts of the instant case, it is apparent that as to one of the original plaintiffs, the son Ellory Schempp, the situation is now the same as in *Doremus*. Ellory has been graduated from the Abington Township High School and no injunction which this Court might otherwise grant can protect or affect his rights. But the other Schempp children are still in the Abington Township High School, and the case is not moot as to them in the sense that it is moot as to Ellory. Nevertheless, their action under the amended Act of 1959 cannot be maintained on their behalf by themselves or their parents since there has been no evidence presented to show that they have been compelled to relinquish any constitutional liberty. No such showing could be made since the statute and practice presently before this Court make attendance at Bible reading exercises purely voluntary.

Although it is recognized that the decision in *Engel v. Vitale*, 370 U.S. 421 (1962), indicates that this Court may have revised its previous holdings concerning the doctrine of "standing in court",[10] appellants contend that since appellees have no legally protected interest which is

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[10] Sutherland, Arthur E., Jr., *Establishment According to Engel*, 76 Harv. L. Rev. at 26-27, 35 (1962):

". . . But in the *Prayer Case* the Court finds no actionable coercion of children to demonstrate dissent,' the majority opinion adopts; instead, a quite different formula—that a classroom exercise, if once found to be an 'establishment of religion,' becomes enjoinable under the fourteenth amendment, even if no schoolchild is subject to 'coercion,' and even if no plaintiff demonstrates any unconstitutional expenditure of taxpayers' money. One finds asserted in *Engel* no requirement that a litigant, if he would invoke judicial power to

injured or threatened by the Bible reading statute, they have no standing to maintain the action and the Court has no jurisdiction to determine in the abstract whether the statute would otherwise be unconstitutional.

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forbid governmental action, must show that by it he 'has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'[4] *Engel* thus suggests that the Supreme Court has somewhat revised its previous ideas concerning 'standing in court,' concerning, that is, the type of grievance a litigant must experience before the federal judiciary will intervene to forbid state governmental activity. The opinions seem to take as premise a judicial function rather more expanded than most lawyers had come to find usual. Here, rather than in the specific issue decided, may turn out to be the ultimate importance of the case."

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"In the *Prayer Case*, the Supreme Court, finding insufficient jurisdictional hardship imposed on the plaintiffs' children, would conventionally have denied certiorari. Absence of proof that the prayer added to school costs had eliminated the only other possible standing, unless *Doremus* was to be disregarded. But the *School Prayer* opinion did not expressly overrule *Doremus;* one wonders if it was overruled in silence. Is there in *Engel* a new doctrine concerning the wrongs against which the fourteenth amendment, judicially enforced, will protect all persons? Where a state does something amounting to 'establishment,' will the Supreme Court enjoin it on the suit of any member of society who dislikes the policy? And is this new doctrine likely to spread beyond religious establishment to other policy judgments?"

CONCLUSION

We accordingly respectfully submit that:

1. The Pennsylvania Bible reading practice does not interfere with appellees' free exercise of religion.

2. Since the Bible reading practice does not involve religious instruction or proselytizing nor require or suggest the performance of a religious act, it is not an establishment of religion within the meaning of the First Amendment to the Constitution.

3. The neutrality to religion required of the government by the First Amendment to the Constitution means that the government cannot be forced by appellees to strike down a traditional and voluntary Bible reading practice simply because it may have, in addition to its secular values, certain religious connotations.

4. Appellees do not have standing to invoke the jurisdiction of this Court.

We therefore respectfully submit that the judgment of the court below be reversed, the final decree below be vacated and the case be remanded to the District Court with a direction to enter judgment for appellants.

Dated: January 4, 1963.

Respectfully submitted,

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APPENDIX

The following is a summary of state constitutional, legislative, judicial and administrative provisions or rulings requiring or permitting Bible reading in the public schools.

ALABAMA

Bible reading is required daily in all public schools. Ala. Code, tit. 52, §542 (Recomp. 1958).

ARKANSAS

Bible reading is required daily in all public schools. Pupils may be excused upon request. Ark. Stat. Ann. §§80-1606, 80-1607 (1947).

COLORADO

Bible reading without comment is permitted on a voluntary basis under *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927).

DISTRICT OF COLUMBIA

Bible reading is required daily in all public schools. Pupils may be excused upon request. Board of Educ., By-Laws, c. 6, §4.

DELAWARE

Bible reading is required in all public schools. 14 Del. Code Ann. §§4102, 4103 (1953).

FLORIDA

Bible reading "without sectarian comment" is required daily in all public schools, pursuant to 1 Fla. Stat.

§231.09 (2) (1959). This practice was upheld on a voluntary basis in 1961 in *Chamberlin v. Dade County Board of Public Instruction* (Circuit Ct., Dade Co., case nos. 59-C-4928 and 59-C-8873) (30 U.S.L. Week 2623, Fla. Sup. Ct., June 6, 1962).

GEORGIA

One chapter from the Bible is required daily reading in the public schools and provision is made for the excuse of any pupils who do not wish to participate. Ga. Code Ann. §§32-705, 32-9903 (1952). See: *Wilkerson v. City of Rome*, 152 Ga. 762, 110 S.E. 895 (1922).

IDAHO

From 12 to 20 verses must be read without comment from the Bible each day in all public schools. Idaho Code §§33-2705-07 (1947).

INDIANA

Daily Bible reading is permitted in the public schools. Ind. Stat. Ann. §28-5105 (Burns 1948).

IOWA

Daily Bible reading in the public schools is permitted and students not wishing to participate may be excused. 1 Iowa Code §280.9 (1958). See: *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202 (1918); *Moore v. Monroe*, 64 Iowa 367, 20 N.W. 475 (1884).

KANSAS

Daily Bible reading in the public schools is permitted. Kans. Gen. Stat. Ann. §72-1628 (Supp. 1961). See: *Billiard v. Board of Education*, 69 Kans. 53, 76 Pac. 422 (1904).

KENTUCKY

Daily Bible reading in the public schools is required and students not wishing to participate may be excused. Ky. Rev. Stat. §158.170 (Baldwin 1955). This practice was upheld against attack on constitutional grounds in *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S.W. 792 (1905).

MAINE

"[R]eadings from the scriptures with special emphasis upon the Ten Commandments, the Psalms of David, the Proverbs of Solomon, the Sermon on the Mount and the Lord's Prayer" are required daily in the public schools. "[E]ach student shall give respectful attention but shall be free in his own forms of worship." 2 Me. Rev. Stat. §145 (1954). See: *Donahoe v. Richards*, 38 Me. 379 (1854).

MARYLAND

Bible reading in public schools on a voluntary basis, pursuant to a rule of the Board of School Commissioners of Baltimore City, has been sustained in *Murray v. Curlett*, 228 Md. 239, 179 A. 2d 698 (1962), *cert. granted*, 31 U.S.L. Week 3116 (U.S. Oct. 8, 1962) No. 119, 1962 Term.

MASSACHUSETTS

Bible reading is required daily in the public schools. Pupils not wishing to participate may be excused. Mass. Ann. Laws, c. 71, §71-31 (1958). See: *Spiller v. Inhabitants of Woburn*, 94 Mass. (12 Allen) 127 (1866).

MICHIGAN

Bible reading upheld by court without benefit of statute: *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N.W. 250 (1898).

MINNESOTA

Bible reading in the public schools on a voluntary basis is permitted under *Kaplan v. Independent School Dist.*, 171 Minn. 142, 214 N.W. 18 (1927).

MISSISSIPPI

Bible reading in the public schools is permitted on a voluntary basis. Const. Art. III, §18, contained in 1 Miss. Code Ann. (1942).

NEW JERSEY

At least 5 verses of the Old Testament are required to be read without comment each day in each public school classroom. N. J. S. A. §§18:14-77, 18:14-78 (1940). See *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880 (1950); *appeal dismissed*, 342 U.S. 429 (1952).

NEW YORK

Bible reading in the public schools on a voluntary basis is permitted. See *Lewis v. Board of Education*, 157 Misc. 520, 285 N.Y.S. 164 (Sup. Ct., N. Y. Co. 1935), *modified* and *affirmed* 247 App. Div. 106, 286 N.Y.S. 174 (1st Dept. 1936), *appeal dismissed*, 246 N.Y. 496, 12 N.E. 2d 172 (1937).

NORTH DAKOTA

Bible reading in the public schools is permitted and provision is made for pupils not wishing to participate. 3 N. D. Cent. Code §15:38-12 (1960).

OHIO

Bible reading in the public schools is permitted. *Nessle v. Hum*, 2 O.D. 60, 1 Ohio N.P. 140 (1894). Cf., *Board of Educ. v. Paul*, 10 O.D. 17, 7 Ohio N.P. 58 (1900).

OKLAHOMA

Bible reading in the public schools is permitted. Okla. Stat., tit. 70, §11-1 (1941).

TENNESSEE

Bible reading in the public schools is required daily, Tenn. Code Ann., §49-1307(4) (1955). See *Carden v. Bland*, 199 Tenn. 665, 288 S.W. 2d 718 (1956).

TEXAS

Bible reading is permitted on a voluntary basis in the public schools. *Church v. Bullock*, 104 Tex. 1, 109 S.W. 115 (1908).